No. 17-333

IN THE

Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, AND SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, STATE ADMINISTRATOR OF ELECTIONS, AND DAVID J. MCMANUS, JR., CHAIRMAN OF THE MARYLAND STATE BOARD OF ELECTIONS,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF BIPARTISAN CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are bipartisan current and former members of Congress who have a strong interest in redistricting and in the robust enforcement of the constitutional principles that govern the electoral process. As current and former members of Congress, *amici* appreciate the significance of the fundamental republican principle that voters choose their representatives, not the other way around, and they are familiar with the constitutional provisions that ensure that this principle is respected. Moreover, as current and former members of Congress, *amici* are particularly familiar with the Elections Clause of the Constitution, which gives Congress the power to override state regulation of the time, place, and manner of federal elections, in order to enable Congress to prevent state manipulation of electoral rules. They also understand the important roles the First and Fourteenth Amendments play in ensuring democratic self-governance. Having served in Congress, *amici* know well how critical it is that these constitutional provisions be enforced, and accordingly they have a strong interest in this case.

A full listing of *amici* appears in the Appendix.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In 2011, the Maryland legislature drew the 6th Congressional District to dilute the voting strength of Republican voters, seeking to flip the district from Republican to Democratic and thereby create a seventh seat in the Democratic congressional delegation. To achieve this end, the mapmakers shuffled hundreds of thousands of citizens either out of or into the 6th District, using sophisticated political data to produce an additional Democratic seat. In so doing, the Maryland mapmakers subordinated voters on account of their political affiliation. The First Amendment does not permit this.

Our Constitution's Framers created a system of democratic self-governance in which freedom of speech and association were guaranteed to all. They recognized that "the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government," James Madison, *Report on the Virginia Resolutions* (1800), *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 546, 575 (Jonathan Elliot ed., 1836) [hereinafter "Elliot's Debates"], and they recognized that the First Amendment would serve as a critical safeguard of democratic self-governance, ensuring that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it[.]" *Id.* at 576. Under our Constitution, "no official, high or petty, can prescribe what shall be orthodox in politics," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), including by subjecting to disfavored treatment persons whose "beliefs and associations" do not "conform . . . to some

state-selected orthodoxy," *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

The First Amendment and other fundamental rights set out in the Bill of Rights originally constrained only the federal government, but, in the wake of a bloody Civil War fought over slavery, the American people "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), adding to the Constitution universal guarantees of substantive fundamental rights. The Fourteenth Amendment requires states to obey the guarantees of freedom of speech and association secured by the First Amendment. "During the Thirty-eighth and Thirty-ninth Congresses, Republicans invoked speech, press, petition and assembly rights over and over—more frequently than any other right . . . ." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 235 (1998). Thus, as this Court has long held, states cannot regulate the electoral process in a manner that runs roughshod over the rights secured by the First Amendment. *See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 754 (2011); *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988); *Anderson v. Celebrezze*, 460 U.S. 780, 786-88, 792-94 (1983). States must respect "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

Partisan gerrymandering is at war with these fundamental First Amendment principles. The drawing of district lines, not to further a legitimate objective, but simply to entrench one party in power "subordinate[s] adherents of one political party," *Ariz.*

State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015), "by reason of their views," *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring), and burdens disfavored "voters' representational rights," *id.* It violates "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around." *Ariz. State Legislature*, 135 S. Ct. at 2677 (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005)). The First Amendment does not permit the government to discriminate against voters because of their political viewpoint or affiliation.

These fundamental First Amendment principles apply whether Democratic voters (as in *Gill v. Whitford*), or Republican voters (as in this case), are systematically subordinated by a partisan gerrymander. Partisan gerrymandering—whether the aim is to subordinate Democratic or Republican voters—is "cancerous, undermining the fundamental tenets of our form of democracy." Juris. Statement App. 37a (Niemeyer, J., dissenting). Efforts by the government to subordinate persons on account of their political affiliation cannot be squared with the freedom of speech and association the Constitution guarantees to all. The state may not place unequal burdens on a group of voters' opportunities to elect their representatives simply because of the party with which they associate. This is viewpoint discrimination pure and simple.

In our constitutional system, when the government abuses its authority, "the judicial department is a constitutional check." 2 *Elliot's Debates* at 196. It is this Court's constitutional responsibility to intervene when state governments use their authority to draw district lines to subordinate voters because of their political affiliation.

See Texas v. Johnson, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) ("[T]he judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.").

It is true, as *amici* well know, that Congress has the power to limit partisan gerrymandering in congressional elections. But this Court cannot delegate to Congress its constitutional role to "say what the law is" and enforce the Constitution's status as "the fundamental and paramount law of the nation." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 177-78 (1803). That would permit the fundamental limits imposed by the First and Fourteenth Amendments to be "passed at pleasure." *Id.* at 178. Undoubtedly, if this Court refuses to entertain extreme partisan gerrymandering claims such as this one, "the temptation to use partisan favoritism in districting in an unconstitutional manner [would] grow." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring).

The Framers recognized that "those who have power in their hands will not give it up while they can retain it. On the [c]ontrary we know they will always when they can rather increase it." 1 *The Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., 1911). It is precisely in cases such as this one that judicial redress is necessary. *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to

be relied upon to protect minorities.'" (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))); *id.* at 363 (Breyer, J., dissenting) ("[W]e cannot always count on a severely gerrymandered legislature itself to find and implement a remedy.").

Maryland's gerrymander of Congressional District 6 is incompatible with bedrock First Amendment principles protecting political affiliation for all and forbidding viewpoint discrimination by the government. The district court erred in refusing to enjoin it.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PERMIT THE GOVERNMENT TO SUBORDINATE VOTERS ON ACCOUNT OF THEIR POLITICAL AFFILIATION.

Maryland's redrawing of Congressional District 6 runs afoul of bedrock First Amendment principles: it "subject[s] a group of voters . . . to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). This cannot be squared with the protection the First Amendment gives to political speech and association or the Amendment's prohibition on government-sponsored viewpoint discrimination.

It is settled that the constitutional guarantee of freedom of speech and association, which protects "the special structural role of freedom of speech in a representative democracy," Amar, *supra*, at 25, "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). This reflects that "the right of electing members of the Government constitutes more particularly the essence

of a free and responsible government." Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 575; *see Citizens United v. FEC*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); *Elrod v. Burns*, 427 U.S. 347, 372 (1976) ("[T]he system of government the First Amendment was intended to protect" is a "democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern.").

In this respect, the First Amendment reflects our Constitution's promise of popular sovereignty: "[i]n our governments, the supreme, absolute, and uncontrollable power *remains* in the people." 2 *Elliot's Debates* at 432 (emphasis in original); *see* Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 569 ("[i]n the United States, . . . [t]he people, not the government, possess the absolute sovereignty"). In other words, "[w]hen it comes to protected speech, the speaker is sovereign." *Ariz. Free Enter.*, 564 U.S. at 754; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976))). As Madison put it, "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the

Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794). The First Amendment ensures that "those in power" may not "derive an undue advantage for continuing themselves in it; which, by impairing the right of election, endangers the blessings of the government founded on it[.]" Madison, *Report on the Virginia Resolutions*, *in* 4 *Elliot's Debates* at 576.

It is also "a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring); *see Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))).

Consistent with these bedrock rules, this Court's First Amendment decisions have repeatedly struck down efforts to subordinate persons belonging to or associated with a political party disfavored by the state. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," *Elrod*, 427 U.S. at 356, and the "right to associate with the political party of one's choice is an integral part of this basic constitutional freedom,"

Kusper v. Pontikes, 414 U.S. 51, 57 (1973). Subordinating adherents of a disfavored political party "based on disapproval of the[ir] ideas or perspectives" is "the essence of viewpoint discrimination." *Matal*, 137 S. Ct. at 1765, 1766 (Kennedy, J., concurring).

Thus, the First Amendment does not permit the state to subject to disfavored treatment persons whose "beliefs and associations" do not "conform . . . to some state-selected orthodoxy," *Rutan*, 497 U.S. at 75, in order to "tip[] the electoral process in favor of the incumbent party," *Elrod*, 427 U.S. at 356; *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) ("With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. The basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" (quoting *Barnette*, 319 U.S. at 642)). "[G]overnment discrimination based on the viewpoint of one's speech or one's political affiliations" is simply antithetical to the First Amendment. *See Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721 (1996) (refusing to permit government to "coerce support" simply because of "dislike of the individual's political association"); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books."); Appellants Br. at 30-31.

The First Amendment analysis that applies in this case and others involving state regulation of the electoral process "concentrates on whether the

legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring). This Court's cases insist on a "pragmatic or functional assessment that accords some latitude to the States," *id.*; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), while ensuring "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Under these established First Amendment principles, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson*, 460 U.S. at 793. This rule reflects the fact that "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." *Williams*, 393 U.S. at 32.

Because "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, efforts by a state to subordinate adherents of a disfavored party and severely limit the effectiveness of their votes cannot be squared with the fundamental limits enshrined in the First Amendment. The First Amendment denies the government the authority to entrench one party in power. *Cf. Rutan*, 497 U.S. at 64 ("To the victor belong only those spoils that may be constitutionally obtained."). The Maryland legislature's redrawing of District 6 cannot be squared with the First Amendment's protection of core electoral speech and association and its prohibition on viewpoint discrimination.

II. THE CONSTITUTION REQUIRES REDRESS BY THE COURTS WHEN STATES SUBORDINATE ADHERENTS OF A POLITICAL PARTY BASED ON VIEWPOINT IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

Judicial relief is warranted here. "[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts' . . . . The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014)). Although this case, like many others, is undeniably sensitive and demands careful judgment, "this is what courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Both at the Founding and following the Civil War, our Constitution's Framers insisted that constitutional "limitations . . . can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78*, at 434 (Alexander Hamilton) (Clinton Rossiter rev. ed., 1999); 3 *Elliot's Debates* at 554 ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). The Framers created the Article III judiciary to "guard the Constitution and the rights of individuals" from "designing men" who have a "tendency . . . to occasion dangerous innovations in the government, and serious

oppressions of the minor party in the community." *The Federalist No. 78*, *supra*, at 437; *The Federalist No. 10*, *supra*, at 49 (James Madison) (discussing the need to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression").

Like their counterparts at the Founding, the Framers of the Fourteenth Amendment recognized that judicial review was essential to ensure that the Amendment's constitutional protections "cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). The Framers understood that the "object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority." *Id.* "[T]he greatest safeguard of liberty and of private rights," they recognized, is to be found in the "fundamental law that secures those private rights, administered by an independent and fearless judiciary." Cong. Globe, 41st Cong., 2d Sess. 94 (1869).

As the Constitution's text and history reflect, "[t]he idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Obergefell*, 135 S. Ct. at 2605-06 (quoting *Barnette*, 319 U.S. at 638). This Court "cannot . . . ask another branch to share responsibility." *Johnson*, 491 U.S. at 420 (Kennedy, J., concurring). This Court's role is to enforce constitutional limits, not leave the job to another branch. "Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Thus, it is of no moment that the Elections Clause gives Congress the power to prescribe a remedy for partisan gerrymandering in congressional redistricting. It is this Court's constitutional role—not Congress's—to ensure that states respect the "fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring).

This Court has repeatedly refused to "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), simply because of the possibility that Congress could act under the Elections Clause. The authority granted by the Elections Clause "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). This reflects the fact that—whether or not Congress acts—the Fourteenth Amendment requires states to respect First Amendment freedoms and obliges courts to intervene to check lawless action at the state level. *Barnette*, 319 U.S. at 637 ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures. . . . These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.").

Consistent with its role of ensuring that states respect the guarantees contained in the Fourteenth Amendment, this Court has repeatedly struck down congressional districting lines that were

malapportioned in violation of the one-person, one-vote principle, *see Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973); *Karcher v. Daggett*, 462 U.S. 725 (1983), or that were drawn predominantly on the basis of race, *see Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Cooper v. Harris*, 137 S. Ct. 1455 (2017). If this Court had to stay its hand because of the possibility that Congress might legislate under the Elections Clause, each of these cases would have come out the other way. Thus, the possibility that Congress might act provides no basis for immunizing Maryland's partisan gerrymander from constitutional review by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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